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Human Rights Committee

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2462/2014^{**}

<i>Submitted by:</i>	M.K.H. (represented by counsel, Helle Holm Thomsen)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Denmark
<i>Date of communication:</i>	26 September 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and rule 97 of the Committee's rules of procedure, transmitted to the State party on 29 September 2014 (not issued in a document form)
<i>Date of adoption of Views:</i>	12 July 2016
<i>Subject matter:</i>	Deportation to Bangladesh
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Risk of torture and ill-treatment
<i>Article of the Covenant:</i>	7
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The author of the communication is Mr. M.K.H.,¹ a national of Bangladesh, of Bengal ethnicity and a Muslim, allegedly born on [REDACTED] 1994. He is a failed asylum seeker in Denmark and faces deportation. He claims that in case of return to Bangladesh, he would be a victim of a violation by Denmark of his rights under article 7 of the International Covenant on Civil and Political Rights. The police have contacted him several times and requested him to cooperate to facilitate his return.² The risk of the author's

^{*} Adopted by the Committee at its 117th session (20 June-15 July 2016).

^{**} The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez Rescia, Fabián Omar Salvioli, Dheerujall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

¹ The counsel requested anonymity for the author.

² Travel documents were issued for the author.

deportation was imminent at the time of submission of the initial communication.³ The Optional Protocol entered into force for Denmark on 23 March 1976. The author is represented by counsel, Helle Holm Thomsen.

1.2 When registering the communication, on 29 September 2014, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures pursuant to rule 92 of its rules of procedure, requested the State party to refrain from deporting the author to Bangladesh, while his case is under consideration by the Committee. The Committee also indicated that it might review the necessity of maintaining this request upon receipt of the State party's observations. On 29 September 2014, the Refugee Appeals Board suspended the time limit for the author's departure from Denmark until further notice in accordance with the Committee's request. On 30 March 2015, the State party requested that the Committee review its request for interim measures in the present case. On 4 June 2015, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided to deny the request to lift interim measures. On 26 February 2016, the State party again requested that the Committee review its request for interim measures. On the same date, the Committee, acting through the Special Rapporteur on New Communications and Interim Measures, rejected this new request.

The facts as presented by the author

2.1 From July 2010 to July 2011, the author maintained homosexual relationship with a childhood friend. They were caught one evening at a rice field following which they were brought to a village council where they were beaten and tortured, including by being hung from a tree, having hot water poured over them, and being beaten under the soles of their feet.⁴ The author was expelled from his family and village, and was threatened to be killed in case of return. He left to Rangpur, where he was recognized by one of the villagers. He then went to Dhaka, and on 5 January 2012, he moved to India from where he left for Europe. On 3 February 2012, the author arrived in Denmark without valid travel documents and he applied for asylum.

2.2 On 15 February 2012, the police interrogated the author about his identity and travel route. He explained that he was born on [REDACTED] 1994 in [REDACTED], in the [REDACTED] region, and that he went to school until 9th grade but did not finish it due to personal circumstances. On 17 February 2012, the author submitted a request for asylum in Denmark, alleging that he had left his home country because citizens in his village had found out that he is a homosexual and he fears to be killed in case of return to Bangladesh. The author has not been a member of any political or religious association or organization, nor has he been politically active in any other way. He was considered to be more than 18 by the police because of his physical appearance, even though he claimed he was a minor. On 7 March 2012, the Section of Forensic Pathology carried out an examination to determine his age. He was considered to be 19 years old or more. The Section considered that although small, "certain probability exist" that he might be as young as 17 years.⁵ On 11 April 2012, the author was confronted by the police. He maintained his explanation with respect to his age on the basis of the information that he had always been provided by his parents. On 4 June 2012, the Danish Immigration Service (DIS) decided to consider the author not to be a minor. It set his date of birth to [REDACTED] 1992 and amended his application accordingly.

³ The author was requested to leave the State party within 7 days from 4 December 2012, date of the Refugee Appeals Board's (RAB) decision.

⁴ See the statements of facts in the RAB's decision of 4 December 2012.

⁵ See the RAB decision of 4 December 2012, page 4 (last sentence).

2.3 On 31 July 2012, the author had an interview with the DIS, during which he referred to his homosexual relationship with a friend, and maintained that he was 17 years old. On 28 August 2012, the DIS rejected the author's asylum claim as non-credible, considering that several aspects of his explanations were unreliable. On an unspecified date, the author appealed to the Refugee Appeals Board (RAB) claiming that the information he had provided was accurate, that he was at risk of persecution from the local community, and that he would not be able to seek protection in Bangladesh where homosexuality is illegal. He further submitted that he could not be forced to hide his homosexuality to avoid persecution, and that, as a member of a particular social group exposed to persecution, he was in need of protection in accordance with article 1 A(2) of the 1951 Convention relating to the Status of Refugees. On 4 December 2012, the RAB upheld the rejection of the author's asylum application finding his allegations non-credible.

2.4 On 12 April 2013, the author requested the RAB to reopen the asylum proceedings and submitted new documents in support of his claim: a newspaper article alleging that the author's mother committed suicide because of problems related to the homosexuality of her son;⁶ and a copy of his birth certificate, stating that he was born on 21 December 1994. In this connection, the author submits that his age has not been reassessed after the production of his birth certificate, and that the RAB failed to take into account that he was a minor at the time of the initial asylum proceedings. He further submits that it is difficult for a minor who grew up in a country in which homosexuality is linked to stigma and shame to talk openly and elaborate on the grounds of his asylum application when they are linked to his sexual orientation. On 4 March 2014, a statement from LGBT Asylum confirmed that the author has been a member of LGBT Asylum since October 2013 and has been participating in their meetings. On 19 September 2014, the RAB confirmed its decision of 4 December 2012, refusing to reopen the asylum proceedings, without examining the new documents submitted by the author.⁷ The RAB considered that it was not plausible that the author would be at risk of persecution only because of his homosexuality as far as, even if homosexuality is illegal in Bangladesh, the relevant legislation is not enforced. The author asserts that the RAB should have followed the procedure as applied in other countries. In this connection, he refers to the jurisprudence of the Supreme Court of the United Kingdom when determining whether an asylum-seeker is a homosexual and whether if returned to his country of origin, he risks persecution or abuse that would make him entitled to asylum.⁸

2.5 As part of asylum procedure, the applicant stated that the authorities in his country of origin were unable to protect him from the people of his village. The author admitted he did not know about the law, but that he was clear that homosexuality was unacceptable from a religious and a social perspective. He also feared starvation as he has no home and no clothing in case of his return to his country of origin.

2.6 Since the decisions of the RAB cannot be appealed before the Danish courts,⁹ the author maintains that he has exhausted all available and effective domestic remedies.

2.7 The author has not submitted his communication to any other procedure of international investigation or settlement.

⁶ The author only produced the document in its original language.

⁷ As of that date, the author's expulsion to Bangladesh became imminent.

⁸ The author refers to the British Supreme Court's judgement in the joined cases *HJ (Iran) and (HT) Cameroon v. Secretary of State for the Home Department* of 7 July 2010.

⁹ See article 56(8) of the Danish Aliens Act.

The complaint

3.1 The author claims that by returning him to Bangladesh, the State party would put him at risk of torture and other forms of inhuman or degrading treatment or punishment, contrary to article 7 of the Covenant, due to the risk of persecution he would face there because of his homosexuality.

3.2 The author submits reports on homosexuality in Bangladesh, which indicate that homosexuality is illegal in that country; and that the police use the law to discriminate, exercise violence and constantly threaten homosexual persons.

3.3 He considers that he could not avoid persecution through the concealment of his sexual orientation, as this would be incompatible with his rights under the provisions of the Covenant. Finally, the author maintains that the State party's authorities including the police and DIS did not take into consideration the fact that he was minor when they initially interviewed him.

State party's observations on admissibility and merits

4.1 On 30 March 2015, the State party submitted its observations on the admissibility and merits of the communication, and requested the Committee to lift the interim measures. It considers that the communication should be held inadmissible, as the author has failed to establish a prima facie case. In this connection, the State party argues that the author did not provide substantial grounds to demonstrate that he would be at risk of torture or other cruel, inhuman or degrading treatment or punishment if returned to Bangladesh. The State party also considers that the author failed to provide specific details about his personal situation; that the RAB made a thorough assessment of the author's credibility, of the background information available, and of the author's specific circumstances; and that the national authorities are best placed to assess the facts and credibility in asylum cases.¹⁰ The State party further argues that the applied asylum procedure fully complies with the principles of due process.¹¹

4.2 The State party further submits that in case the Committee holds the author's complaint admissible, it should consider it unsubstantiated as the author failed to establish that his deportation to Bangladesh would constitute a violation of article 7 of the Covenant. In this connection, the State party submits that the RAB generally considers that the

¹⁰ The State party draws the attention to the jurisprudence of the European Court of Human Rights on this issue. e.g. *R.C. v. Sweden* (application No. 41827/07, para. 52): "The Court observes, from the outset, that there is a dispute between the parties as to the facts of this case and that the Government have questioned the applicant's credibility and pointed to certain inconsistencies in his story. The Court acknowledges that it is often difficult to establish, precisely, the pertinent facts in cases such as the present one. It accepts that, as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned." The State party refers further to the jurisprudence of the Committee—communication No. 2186/2012, *Mr. X. and Ms. X. v. Denmark*, Views adopted on 22 October 2014, para. 7.5.

¹¹ The State party also refers to the judgement of the European Court of Human Rights which dealt with the national procedures applied in the author's asylum case, *M.E. v Denmark* (application No. 58363/10, para. 63): "In their decisions of 10 August 2009 and 2 December 2009 the Aliens Service (the Danish Immigration Service) and the Refugee Appeals Board rejected these allegations. The Court observes that before these instances, the applicant was represented by a lawyer and he was given the opportunity to submit written observations and documents. His arguments were duly considered and the authorities' assessment in this regard must be considered adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources."

conditions for granting a residence permit under section 7(1) of the Aliens Act are met when the relevant asylum-seeker has a well-founded fear of being subjected to specific, individual persecution of a certain severity, if returned to his country of origin. When the RAB finds that the asylum-seeker's statements on his ethnicity, religion, political views or membership of a particular social group can be found as facts, but his activities or the measures taken against him in his country of origin do not constitute sufficient grounds for him to fall within the scope of article 1A(2) of the 1951 Convention, his application for residence under section 7 of the Aliens Act will be refused.

4.3 The State party observes that according to the case law of the RAB, homosexuals are considered as belonging to a particular social group and that, depending on circumstances, they may fall within the Refugee Convention. In the present case, the RAB took into account the information provided on persecution prior to the author's departure from his country of origin, and based itself on the assessment of his situation in case of return to the country of origin. In its decision of 4 December 2012, the majority of the RAB members considered the author's allegations lacked credibility and appeared fabricated for the occasion. The RAB found it peculiar that the applicant did not himself contact his mother, who had obtained valuables worth approximately 600,000 taka,¹² the sum of which was paid to the agent who arranged for the author's departure. The author allegedly took contact through a person whom the applicant had met at random. The RAB also considered suspicious that the applicant had dared to have sexual intercourse with a friend in a paddy field several times. Finally, the RAB considered that the applicant had given inconsistent statements: he stated to the DIS that he was sitting at a café when the person from the village spotted him in Rangpur, whereas he stated before the RAB that he was recognized by a village citizen who was sitting in a tea-house, while he was in the street. Based on an overall assessment, the majority of the RAB found that the author had failed to render his grounds for asylum credible. It concluded that the author would not be at a real risk of persecution under section 7(1) or abuse falling within section 7(2) of the Aliens Act in case of his return to his country of origin. For those reasons, the RAB upheld the decision of the DIS.

4.4 On 12 April 2013, the author requested the reopening of the asylum proceeding. As a reason for reopening, the author submitted that it appeared from the decision of the RAB that it had not considered a fact that he was a homosexual. The author claimed that he would risk persecution simply because of his sexual orientation, regardless of whether he had had a homosexual relationship or not. He also objected to a wrongful assessment of his credibility, arguing that paddy fields may be so tall that a person could hide there. On 19 September 2014, the RAB ruled on three documents produced by the author that were also provided to the Committee (annexes A, B, C) and found that no new information rendered the risk of persecution probable or substantiated in case of the author's return to Bangladesh. The State party observes that the author did not provide any new information to the Committee that would justify a revision of its assessment of the author's case by State party's authorities. The State party further submits that even when a person makes consistent statements, these are not necessarily true and cannot necessarily be considered as facts when their content is unlikely and do not seem to reflect a personal experience.

4.5 In this connection, the State party observes that the author's educational and personal skills enabled him to repeat the same narration several times without any essential discrepancies. It further argues that the author's statement alleging that the DIS and RAB based their decisions on the fact of his homosexuality is suspicious, in so far as none of the decisions concluded that it can be assumed that the author is homosexual. The State party

¹² Approximately 7638 US\$.

observes that the author consistently stated that his homosexual relationship with his friend Tuhin had been discovered; that he was therefore subjected to abuse and persecution prior to his departure; and that he feared that he would again be subjected to treatment falling within section 7 of the Aliens Act in case of return to Bangladesh. In the RAB decision of 4 December 2012, the author was found not to have rendered probable that he had been subjected to abuse and persecution prior to his departure the way described. Consequently, the RAB dismissed the author's statements as unlikely and apparently fabricated. In its decision of 19 September 2014, the RAB concluded that the reasons given by the author on the risk of persecution he would face upon his return were closely connected to those events, and no other reason was provided. It therefore concluded that the author had failed to substantiate that his membership and possible homosexuality had resulted in a conflict with the authorities or private individuals in Bangladesh that would justify asylum.

4.6 On the contrary, the State party considers as a fact that the author was not subjected to persecution, abuse or similar treatment prior to his departure: he was able to live in Bangladesh as a homosexual until his departure in 2011/2012 without encountering conflicts with the authorities of the State party or with private individuals. The State party agrees with the assessment of the RAB that the mere reference to the general background information available on the condition of LGBT people in Bangladesh is not sufficient to substantiate that the author would risk a personal risk of persecution or abuse upon his return to Bangladesh. In its decision of 19 September 2014, the RAB noted that the situation of homosexuals in Bangladesh has improved considerably in recent years, and that although homosexuality is illegal pursuant to section 337 of Penal Code 1860, this act is not enforced in practice. The State party further notes that numerous support networks for homosexual men were established in the country. As regards the author's membership of LGBT Asylum, the RAB was not able to take it into account in its decision of 4 December 2012 because, as indicated by the author himself and by the letter of the association, it only started in October 2013.

4.7 The State party takes note of the newspaper article from the Daily Banglar Manush of 24 March 2013, which was submitted by the author to the RAB on 12 April 2013¹³ after having obtained it through friends of a friend. According to this article, an elderly lady named R. B. hanged herself on 2012 in the village of . During the investigation, it was allegedly discovered that two boys, one of them being the author, had had a homosexual relationship in July 2011, that they had been apprehended and brought to a member of the village council, and had spent the night with their hands tied behind their backs. The article also reflects that the boys were banished from the village, and that one of them had come back there two months later to see his sister, and that on this occasion, he was captured and tortured, including through the removal of his genitals following which he died. The article also reports that the author's family now carried an isolated life because of his homosexuality and that his father had died from a heart attack on 2 March 2012. The RAB assessed that it could not verify the authenticity of the newspaper article, considering the time of its appearance, and the lack of clarity on its sources in Bangladesh and its procurement through the author's friends in Saudi Arabia. The RAB also found that the article lacked credibility on its contents, considering the amount of specific details, which correspond exactly to the author's statements on his grounds for asylum. Therefore, it appeared fabricated for the occasion, considering that false documents are common in Bangladesh, according to the information by the State party's Ministry of Foreign Affairs. In this respect, the RAB, despite the confirmation by UNESCO Bangladesh that a newspaper of the relevant name did exist, did not find a reason

¹³ The author has not produce a translated version of the document, which had to be arranged by the RAB, and did not explain how he came into possession of the document.

to have the authenticity of the news article verified. Against this background, the State party cannot give any evidential value to the document produced by the author.

4.8 The State party observes that the author fails to substantiate why he considers that the submissions concerning his age entail a violation of article 7 of the Covenant. It submits that the DIS is the authority in charge of determining the age of asylum-seekers whenever necessary. The Section of Forensic Pathology examined the author and determined that he was 19 years or more. On 4 July 2012, the DIS decided to fix the author's date of birth to ██████████ 1992. The author appealed this decision to the Ministry of Justice, which upheld it on 9 March 2015. The RAB also assessed positively that the author had the procedural capacity and the necessary maturity to undergo the asylum procedure. The State party also submits that in cases where the asylum-seeker refers to his sexuality or gender identity, the RAB assesses whether the person is in a particularly vulnerable situation, taking into account the relevant UNHCR Guidelines.¹⁴ The State party considers it strange that the author did not provide any information about the way he obtained his purported birth certificate, which was issued on 18 February 2013, while his parents passed away almost a year before that date and while, according to his own statements, he does not have contact with his family since he left Bangladesh.¹⁵ In this connection, the State party adds that the author did not disclose the identity of the person who purportedly requested the issuance of this document and the basis on which it was issued.

4.9 The State party maintains that the author merely disagrees with the assessment of his credibility and of the background information made by the RAB in his case. However, it considers that the author failed to identify any irregularity in the decision-making process or in the assessment of the risk factors by the RAB. The State party therefore considers that the author is trying to use the Committee as an appellate body to have the factual circumstances of his case reassessed. It further submits that the Committee must give considerable weight to the facts found by the RAB, which is better placed to assess the factual circumstances of the author's case. The State party considers that there is no basis for questioning or setting aside the assessment made by the RAB in the author's case, and therefore submits that the author's return to Bangladesh will not constitute a breach of article 7 of the Covenant.

Author's comments on the State party's observations

5.1 On 29 May 2015, the author submitted his comments on State party's observations. He claims that he provided sufficient information to indicate that, as a homosexual, he will face a danger of treatment contrary to article 7 of the Covenant, if returned to Bangladesh. He claims that his communication should be held admissible as it has been sufficiently substantiated and all available domestic remedies have been exhausted, and that the request to lift interim measures should be denied.

5.2 On the merits, the author claims that the State party erred in the assessment of his age and that it did not provide him with the assistance he was entitled to as a minor throughout the asylum procedure (such as the appointment of a legal guardian). The author

¹⁴ The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, published on 23 October 2012.

¹⁵ The RAB decision of 19 September 2014 indicates that the author's counsel stated that the author was not in possession of the original birth certificate. The birth certificate had been registered on 11 July 2008 because it was not until 2004 that a statute on birth certificates had been enacted, making such certificates statutory.

further submits that the State party did not take into account the fact that he was a minor when assessing the facts and his credibility.¹⁶

5.3 The author considers that the same attention should be given to the fact that he is a young homosexual man who was ostracized from local society and from his family shortly before his arrival to Denmark. The vulnerability of the author's situation, which justifies his request for asylum, rests in his young age and the fact that homosexuality is a stigma in his society, family and religion. The RAB failed to take into account the specific circumstances and vulnerability of the author. The author also submits that the State party erred in the conclusion of 19 September 2014 that the newspaper article he had provided was fake: he informs that he has a full authentic copy of the newspaper, which exists since 2005 and is listed on the website of the Bangladesh Digital Media Database as a regional newspaper. The author therefore submits that the State party has not made a thorough evaluation of the facts and the documents in the decision-making process.

5.4 The author also submits that the first RAB decision did not consider whether being a homosexual would in itself constitute a risk of persecution in case of return to Bangladesh. Furthermore, the second RAB decision suggested that the situation of homosexuals in Bangladesh has improved, despite the background information he submitted to the contrary. He finally submits that the one inconsistent statement that the RAB has found, whether it was actually him who was in a café, is likely the result of an error of interpretation and cannot be the basis for rejecting the author's statement.

5.5 The author also challenges the RAB's conclusion that the situation of homosexuals has improved considerably in recent years in Bangladesh. In this connection, he submits that the 2013 US Department of State country report and the 2013 UK Home Office Country of Origin Information Report on Bangladesh do not give any basis for such a conclusion. The author further submits that even though section 377 of the Penal Code 1860 is not enforced in practice, the act is still used by the police, together with section 54 of the Code of criminal procedure, to threaten and harass LGBT persons. The use of Section 54 does not lead to criminal charges or prosecution but rather to abuses such as extortion and physical assaults, which the victims do not dare to report.¹⁷ Finally, the author refers to the Committee's jurisprudence in *M.I. v. Sweden*,¹⁸ where it considered that the deportation to Bangladesh of the author, a homosexual person, would constitute a violation of article 7 of the Covenant.

State party's additional observations

6.1 On 26 February 2016, the State party presented further submission. It maintains that the author has failed to establish a prima facie case for the purpose of admissibility of his communication under article 7 of the Covenant, and that the communication should be held inadmissible.

6.2 Should the Committee find the communication admissible, the State party maintains that there are no substantial grounds for believing that the author's deportation to Bangladesh would constitute a violation of article 7 of the Covenant. The State party reiterates that there is no basis for doubting, let alone setting aside, the assessment made by the RAB in its decisions of 4 December 2012 and 19 September 2014 in the author's case. It further draws the attention to the jurisprudence of the Committee, according to which important weight should be given to the assessment conducted by the State party, unless it

¹⁶ The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, section 213-219.

¹⁷ This information can be seen from the UK Home Office report from 2013.

¹⁸ See communication No. 2149/2012, *M.I. v. Sweden*, Views adopted on 25 July 2013, para. 7.5.

is found that the evaluation was “clearly arbitrary” or amounted to “a denial of justice”.¹⁹ The State party considers that the author does not explain why the assessment would be arbitrary or otherwise amount to a manifest error or denial of justice in his case.²⁰ It also recalls that it is generally for the organs of State party to examine the facts and evidence of the case in order to determine whether a risk exists. It further submits that even though the author had been found to be less than 18 years of age, the RAB had carried out the necessary assessments to conclude that the author had the procedural capacity and the necessary maturity to undergo an asylum procedure. The State party maintains that the RAB took the author’s cultural difference, age, maturity and alleged sexual orientation into account.

6.3 The State party further contests the author’s reference to the views of the Committee in *M.I. v. Sweden* as this case differs from the present case on essential points. In *M.I. v. Sweden*, the author’s sexual orientation and her allegations of rape by Bangladeshi policemen while in detention were not challenged by the State party, and the authorities of the State party had considered it a fact that the author had been subjected to abuse in her country of origin. In the present case, State party’s authorities carried out a thorough assessment of the author’s statements and of the documents provided by the author (see the decisions of the RAB of 4 December 2012 and 19 September 2014), and the RAB rejected crucial elements of the author’s statements as being non-credible and fabricated for the occasion. Accordingly, the RAB could not accept as a fact the author’s statement on his grounds for asylum. In the attached addendum, the State party’s Ministry of Foreign Affairs confirms that the newspaper “the Daily Banglar Manush” appears on the information portal of the Bangladeshi government, and operates as a local newspaper primarily based on first hand sources. However, the RAB decision of 19 September 2014 considered only whether the newspaper article produced was deemed to be fabricated for the occasion, and not whether the relevant newspaper exists. The State party considers that the publication of the article in “the Daily Banglar Manush” must be considered a fact, but that this publication would not expose the author to such a level of persecution or abuse that would justify granting him asylum, because of the limited circulation of the referred newspaper.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee further recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.²¹ The Committee takes note of the author’s submission

¹⁹ Communication No. 2272/2013, *P.T. v. Denmark*, Views adopted on 1 April 2015, para. 7.3.

²⁰ See e.g. communication No. 2393/2014, *K. v. Denmark*, Views adopted on 16 July 2015, paras. 7.4 and 7.5. See also communication No. 2426/2014, *N. v. Denmark*, inadmissibility decision adopted on 23 July 2015, para. 6.6.

²¹ See e.g. communication no. 2097/2011, *Timmer v. the Netherlands*, Views adopted on 24 July 2014, para. 6.3.

that he has exhausted all available domestic remedies as the decisions of the RAB cannot be appealed. The Committee also notes that the State party has not contested the author's submission to that regard.

7.4 The Committee also notes that the State party considers that the author's claim under article 7 should be held inadmissible for lack of substantiation. Nonetheless, the Committee considers that the author has provided sufficient details and documentary evidence for the purpose of admissibility. As no other obstacles to admissibility exist, the Committee declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim that his return to Bangladesh would expose him to a risk of torture and persecution due to his homosexuality. In this connection, the Committee notes that, according to the author, he maintained homosexual relationship with a friend from July 2010 to July 2011, and that they were caught at a rice field and brought to a village council where they were beaten and tortured. The Committee also notes that the author was expelled from his family and village, and threatened to be killed if he would ever return, and that when the author's partner returned to the village to visit his sister, he was tortured and consequently died. The Committee further notes that according to the reports submitted by the author: (a) the Bangladeshi law forbids homosexual acts and LGBT individuals lack protection from the authorities; (b) the police use it to discriminate and exercise violence against homosexuals; (c) and the law serves as a constant threat even if it is not systematically applied.

8.3 The Committee further notes the author's submission that in the decision process, State party's authorities did not give due weight to the evidence he had provided. In particular, the Committee notes that when the author presented a birth certificate indicating that he was born on 21 December 1994, and was therefore 17 when he arrived in Denmark, the State party questioned the credibility of the author, but did not take any further measure to verify the provided information as to his actual age. The Committee also notes that when the author provided a copy of an article published in the newspaper *the Daily Banglar Mamush* that made reference to the events occurred after his homosexual relationship was discovered, the State party first questioned the existence of the referred newspaper, and then the genuineness of the article. In the author's view, the State party did not realize a thorough evaluation of the facts and documents he had submitted: he argues that the first RAB decision did not assess whether being homosexual would constitute a risk of persecution, and that the second RAB decision suggested that the situation of homosexuals had improved in Bangladesh, despite of the background information provided to the contrary.

8.4 The Committee also notes the State party's assessment that the information provided by the author did not enable it to conclude that, even if he were homosexual, he would be at risk of persecution upon his return to Bangladesh; that section 337 of Penal Code 1860 which criminalizes homosexual acts is not applied in practice; and that the situation of homosexuals has improved considerably in recent years.

8.5 The Committee recalls its general comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk

of irreparable harm such as that contemplated by article 7 of the Covenant.²² The Committee has also indicated that the risk must be personal²³ and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.²⁴ Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.²⁵

8.6 The Committee further recalls its jurisprudence that important weight should be given to the assessment conducted by the State party, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice,²⁶ and that it is generally for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.²⁷

8.7 In the present communication, the Committee notes that the State party considered that the author was more than 18, while the Section of Forensic Pathology had concluded that, although small, "certain probability exist" that the author might be as young as 17 years. It also notes the State party's arguments that the author's age has been properly assessed by the DIS, and upheld by the Ministry of Justice; that the RAB assessed the author's procedural capacity even if he was over 18; and that the author's vulnerability was properly assessed in accordance with the relevant UNHCR Guidelines. It notes that the State party did not question the authenticity of the birth certificate that the author provided, but questioned the way it was obtained. The Committee notes that, in this context, the State party did not consider that the author could be a minor; it did not provide him with any of the assistance he was entitled to as a minor during the asylum procedure; and it did not take into account the fact that the author could be a minor likely to face a personal risk when assessing whether his return to Bangladesh would constitute a violation of article 7 of the Covenant. The Committee considers that this practice amounts to a procedural defect in the examination of the author's request for asylum.

8.8 The Committee further notes that the DIS and RAB concluded that the author's homosexuality was suspicious, and that he had not demonstrated that his alleged homosexuality would put him at risk in case of return to Bangladesh. The Committee also notes that, to reach this conclusion, the State party focused on the assessment of the credibility of the author throughout the procedure, without further evaluating the statements before it. The Committee in particular notes that the RAB in its decision of 4 December 2012 did not explain on which grounds it disregarded the author's self-identification as homosexual and his allegations of a real risk of persecution or abuse in case he would be returned to Bangladesh. Furthermore, since the DIS and RAB found the author's homosexuality suspicious, they did not take into account the author's allegations that: (a) he and his partner were tortured and expelled from their village upon discovery of their

²² See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

²³ Communications No. 2007/2010, *J.J.M. v. Denmark*, Views adopted on 26 March 2014, para. 9.2, and No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.6. See also Committee against Torture, communications No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; and No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010.

²⁴ See *J.J.M. v. Denmark*, supra n. 24, para. 9.2, and No. 1833/2008, *X. v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

²⁵ *Ibid.*

²⁶ See, inter alia, *ibid.* and communication No. 541/1993, *Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

²⁷ See communications No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4, and No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 9.3.

homosexual relationship; (b) he was told that he would be killed if he tried to come back to the village and his family; (c) his partner was tortured and consequently died when he tried to return to their village for a visit; and (d) no protection could be expected from the national authorities against this form of repression of homosexuality, which is widely practiced in Bangladesh. In the same way, the State party did not take into account the information provided by the author according to which homosexuality is stigmatized in Bangladesh, and remains criminalized by section 377 of the Criminal Code, which in itself constitutes an obstacle to the investigation and sanction of acts of persecution against LGBTI persons. In addition, the Committee notes that the author is Muslim, and that at the date of the present decision, LGBTI people in Bangladesh remain frequently victims of threats of violence, particularly after homophobic public comments by Islamic leaders. In view of the above, the Committee considers that, when assessing the risk faced by the author, the State party failed to take adequately into account his version of the events he faced in Bangladesh, the documents he provided, and the available background information about the risks faced by LGBTI people in Bangladesh, thereby arbitrarily dismissing the author's claims.²⁸ In such circumstances, the Committee considers that the author's deportation to Bangladesh would amount to a violation of article 7 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that deportation to Bangladesh would, if implemented, violate the author's rights under article 7 of the Covenant.

10. In accordance with article 2 (1) of the Covenant which establishes that States parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, the State party is under an obligation to proceed to a review of his claim taking into account the State party's obligations under the Covenant and the Committee's present Views. The State party is also requested to refrain from expelling the author while his request for asylum is being reconsidered.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

²⁸ See the notion of arbitrariness in the Committee's General comment No. 35 on Article 9 (Liberty and security of person), para. 12.

Annex I

Joint Opinion by Committee Members Mr. Yuval Shany, Mr. Olivier De Frouville, Mr. Yuji Iwasawa, Ms. Ivana Jelic, and Sir Nigel Rodley (dissenting)

1. We regret that we are unable to join the majority on the Committee in finding that, in deciding to deport the author, Denmark would, if it implemented the decision, violate its obligations under article 7 of the Covenant.

2. In paragraph 8.6 of the Views, the Committee recalls that: “important weight should be given to the assessment conducted by the States parties’ authorities, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice, and that it is generally for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists”. Despite this, the majority of the Committee rejected the factual conclusion of the DIS and RAB that the author failed to establish grounds for asylum because his allegations about his persecution in Bangladesh lacked credibility and appeared to have been fabricated for the occasion (para. 4.3.), and criticized the State party for failing to “take adequately into account his version of the events he faced in Bangladesh, the documents he provided, and the available background information about the risks faced by LGBTI people in Bangladesh, thereby arbitrarily dismissing the author’s claims” (para. 8.9.)

3. We disagree with the analysis by the majority. All of the allegations raised by the author were considered by the DIS and RAB and rejected as lacking in credibility because of their improbability, the inconsistency of some statements, or their apparent failure to reflect a personal experience. The author has also failed to contest (and the majority fails to explain) the finding by the State party that he was not subjected in Dhaka to persecution, prior to leaving Bangladesh. Nor has he adequately explained in what way he will be at risk in Bangladesh, were he not return to the village in which the alleged events occurred. Hence, we do not find in the record any reason to regard the conclusions of the DIS and RAB as arbitrary or a denial of justice. As a result, we are of the view that the majority on the Committee failed to properly apply the ‘clearly arbitrary or denial of justice’ standard.²⁹

4. In past cases in which the decision of state organs to deport an individual was found by the Committee to run contrary to the Covenant, the Committee sought to base its position on inadequacies in the domestic decision-making process, such as failure to properly take into account available evidence or the specific rights of the author under the Covenant,³⁰ serious procedural flaws in the conduct of the domestic review proceedings,³¹ or the inability of the State party to provide a reasonable justification for its decision.³² In the present case, the majority on the Committee points only to one flaw in the asylum proceedings in Denmark - the alleged failure of the State party to consider the author as a minor. We disagree with this aspect of the majority’s analysis as well.

5. Although it found that the author’s age was probably more than 18 at the time of the proceedings, the State party maintains that it treated him as if he were a minor (para. 6.2), and took account of his age in determining his capacity to undergo the process, and as one

²⁹ See e.g., Communication No. 1138/2002, *Arenz v Germany*, Views adopted on 29 April 2004, para. 8.6.

³⁰ See e.g., Communication No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 Mar 2010, at paras. 8.4 - 8.6.

³¹ See e.g., Communication No. 1908/2009, *X v Republic of Korea*, Views adopted on 25 May 2014, para. 11.5.

³² See e.g., Communication No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 Nov. 2004, para. 11.3-11.4.

element in evaluating his statements. The author has not responded to these claims by the State party; nor did he explain in what concrete way did the State party fail to take account of his age throughout the proceedings, or how such an alleged failure actually disadvantaged him. We note, in this regard, that the author was represented throughout the proceedings in Denmark, and that even according to his version of the facts, he was just a few months short of his 18th birthday (i.e., it would have necessitated relatively few adjustments to the process).

6. In light of these factors, we do not consider it well-established that the proceedings suffered from a procedural defect that should lead us to doubt the outcome of the asylum process, or its fairness.

Annex II

[Original: Spanish]

Concurring opinion of Víctor Rodríguez-Rescia

1. The present opinion is entirely in conformity with the Committee's decision regarding communication No. 2462/2014. I would simply like to highlight some facts and considerations which may lead to a better understanding of the reasons why this communication was declared admissible in form and in substance.

2. Firstly, I have always had a high regard for the protection scheme in place for asylum seekers in Denmark. However, I am concerned by certain very subjective criteria sometimes used by the State to determine the "credibility" of asylum seekers. In the present case, there is a clear predisposition on the part of the State to discredit the author by all means possible in order to deny him any possibility of asylum or additional protection under the Covenant.

3. The State tried to refute the facts of the case as follows: A. The police considered the author to be over 18 "due to his physical appearance" and based on an examination by the Forensic Pathology Section, which found him to be 19 or over, although "the possibility existed, however small, that he was only 17" (emphasis added). At that point, the State should have given him the benefit of the doubt and presumed him to be a minor, and all the more so when the author later provided a birth certificate issued on 18 February 2013. Instead, the State questioned how the author had obtained the birth certificate and alleged it was false, when, in actual fact, what it could have done, but did not do, was simply to request the author's official birth certificate through its embassy in Bangladesh. The State could not objectively demonstrate that the certificate was false. B. The author's claim that, because of his homosexuality, he risked being persecuted and abused if he were returned to Bangladesh was discounted by the State because "none of the decisions concluded that it can be assumed that the author is homosexual". The State also concluded that "the condition of LGBT people in Bangladesh is not sufficient to substantiate that the author would run a personal risk of persecution or abuse upon his return to Bangladesh", that "the situation of homosexuals in Bangladesh has improved considerably in recent years", and that "although homosexuality is illegal pursuant to article 337 of [the] Penal Code of 1860, this Act is not enforced in practice". It is true that the fact that the author of a communication is homosexual should not be considered a sufficient reason for not deporting him or her to a country where homosexuality is outlawed; however, the arguments put forward by the State are insufficient to discount the risk facing the author, given that his self-identification as homosexual makes it a problematic undertaking to cast doubt on his identity as a homosexual. The facts and documents presented in evidence by the author are not vastly different from those presented in a similar case considered by this Committee (*M.I. v. Sweden*, communication No. 2149/2012, Views adopted on 25 July 2013). The fact that homosexuality is a crime in Bangladesh clearly stigmatizes that sector of the population, even if the law is not enforced in practice. The safety and security of LGBT persons in Bangladesh have not improved in the way the State claims, and the State made excessive demands for evidence from the author to demonstrate his homosexuality and/or the risk to his life or personal safety in order to discredit him. (The State considered it surprising "that the applicant had dared to have sexual intercourse with a friend in a paddy field several times", and "peculiar that the applicant did not himself contact his mother" and contended that "the applicant had given inconsistent statements", in that he told the Immigration Service "that he was sitting at a café when the person from the village spotted him in Rangpur, whereas he stated before the [Refugee Appeals Board] that he was

recognized by a village citizen who was sitting in a tea house, while he was in the street". Equally, the State required a higher standard of proof to demonstrate that LGBT persons were at risk. A press cutting was dismissed because the State decided "that it could not verify the authenticity of the newspaper article, considering the time of its appearance, and the lack of clarity on its sources in Bangladesh and its procurement through the author's friends in Saudi Arabia" and thus considered it to have been falsified. Despite the fact that the United Nations Educational, Scientific and Cultural Organization (UNESCO) office in Bangladesh confirmed the name of the newspaper, the State did not find a reason to have its authenticity verified.

4. I find that the State abused its legal authority and duty to evaluate the facts and arguments in this case based on the claim that "the national authorities are best placed to assess the facts and credibility in asylum cases". Such authority has its limits, and the State should make reasonable assessments based on sound judgment and experience. In this communication, the State was first and foremost concerned with questioning the author's credibility in connection with a number of details, thus derailing the main objective, which was to protect the rights, as upheld in the Covenant, of a person who could be presumed to be minor in a foreign country who was without his parents. In this case, due process called for the provision of special protection through affirmative action in the author's favour.